

The Appeals Board has considered the record listed in the Award. At oral argument, the parties acknowledged the January 29, 1999, discovery deposition of claimant, which was listed in claimant's brief, is not part of the record for purposes of this award and, thus, has not been considered by the Appeals Board.

The Appeals Board adopts the stipulations contained in the Award. In addition, at oral argument, the parties agreed that, in Docket No. 234,119, claimant's average weekly wage of \$658 would entitle him to the maximum weekly benefit of \$351. Therefore, that issue is no longer before the Board. The average weekly wage findings of the Administrative Law Judge in the Award are, therefore, affirmed by the Board.

### **ISSUES**

- (1) What is the nature and extent of claimant's injury and/or disability? Claimant contends entitlement to a whole body disability and a work disability for the injuries suffered to his bilateral shoulders and his neck and upper back. Respondent contends claimant suffered two scheduled injuries, with the first being to the right shoulder on June 1, 1996, and the second being a series from April 19, 1997, through June 13, 1998, to claimant's left shoulder. Claimant further contends he suffered simultaneous aggravation of the shoulders while employed with respondent, thus entitling him to a whole body impairment and work disability as well.
- (2) Is claimant entitled to unauthorized medical treatment and future medical treatment for the injuries suffered with respondent?
- (3) Did the Administrative Law Judge ignore uncontroverted evidence in the form of the work disability opinion of Bud Langston?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds the Award of the Administrative Law Judge should be affirmed as to both docketed claims.

Claimant worked for respondent as a painter and wallpaper hanger. His duties included loading and unloading of material, hanging wall coverings, staining and varnishing, refinishing and painting. Claimant began experiencing problems in his right shoulder in June 1996 while working at a school, putting the finishing touches on approximately 200 doors. Claimant informed his employer that he was having pains in his right shoulder. He also experienced difficulty turning the steering wheel of his car on his way home. Claimant, on his own, went to Kevin R. Sundbye, M.D., a board certified internal medicine specialist, for treatment. Dr. Sundbye treated claimant with cortisone injections and ordered an MRI, which showed a rotator cuff tear in the right shoulder.

Claimant was referred to Michael T. McCoy, M.D., an orthopedic surgeon in Topeka, Kansas. Dr. McCoy performed a surgical repair to claimant's torn rotator cuff on September 9, 1996, and after a period of recovery released claimant to work on August 6, 1997, with restrictions. He assessed claimant a 16 percent impairment to the right upper extremity at the shoulder.

Claimant returned to work with respondent in August 1997 at his regular duties. Claimant began developing problems in his left upper extremity in late 1997. Claimant testified that he also developed pain into his neck which he described as progressing. Claimant was returned to Dr. McCoy, who performed an arthrogram on the left shoulder. The arthrogram proved normal, showing no evidence of a rotator cuff tear. Dr. McCoy provided conservative treatment to claimant's left shoulder, ultimately placing him on permanent restrictions for both of his shoulders. Claimant did not make any complaints to Dr. McCoy regarding his cervical spine between August of 1996 and July 13, 1998. Claimant last worked for respondent on June 13, 1998.

Claimant first complained about his cervical spine in September 1998 to Dr. Sundbye. Dr. Sundbye diagnosed degenerative disc disease and spondylosis of claimant's entire spine. Claimant had earlier complained about his lumbar spine which Dr. Sundbye diagnosed in February 1998 as degenerative disc disease, including moderate degenerative arthritis at all levels of the lumbar spine.

Dr. Sundbye testified that claimant's cervical spondylosis and degenerative disc disease were unpredictable and, except in cases of specific trauma, without a primary cause. He described them as being part of the aging process. When asked whether claimant's work activities caused or contributed to his spondylosis, he testified to the best of his ability "no". He also went on to testify that the degenerative disc disease and spondylosis in his neck were similar to the condition diagnosed in his lumbar spine. Dr. Sundbye stated that these conditions were part of the natural aging process and not related to claimant's work activities.

Dr. McCoy testified that claimant's cervical complaints, in particular spondylosis, is usually caused by wear and tear, although it can be caused by trauma. He also testified that someone predisposed to developing arthritis in one part of the spine is more apt to get it in another area as well. With regard to claimant's neck problems, Dr. McCoy stated that, as long as there was no history of an injury or falling on the neck, he felt claimant's condition was the result of normal wear and tear.

Claimant was referred to board certified orthopedic surgeon C. Eric Nye, M.D., by the Administrative Law Judge for an independent medical examination on January 7, 2000. He found claimant to have recovered from the rotator cuff repair to his right shoulder, but still complaining of bilateral arm and neck pain. He assessed claimant a 19 percent impairment to the body as a whole based upon the AMA Guides to the Evaluation of

Permanent Impairment, Fourth Edition. He found claimant to have suffered an injury to his right shoulder as a result of the work. Dr. Nye went on to state that, as a result of what claimant was doing, he developed problems in his left shoulder, which Dr. Nye described as being consistent with the type of problem that is aggravated and made worse on a day-to-day basis with the type of work claimant was performing.

Dr. Nye also agreed that spondylosis can occur without any type of trauma or injury to the neck. In his 19 percent impairment assessed to claimant, 10 percent was to the right shoulder, 5 percent was to the left shoulder and 5 percent was to the neck. Dr. Nye testified that the 5 percent he gave for claimant's neck impairment was due to the degenerative disc disease. He testified that claimant's work did not cause his degenerative disc disease, but that it may have aggravated it. Dr. Nye was unable to say within a reasonable degree of medical probability whether the cervical spondylosis was aggravated by claimant's work.

Claimant was referred to emergency medicine and occupational specialist P. Brent Koprivica, M.D., by his attorney, with the first examination being on December 13, 1997. At that time, Dr. Koprivica diagnosed claimant with a rotator cuff tear which had been surgically repaired. He assessed claimant a 29 percent impairment to the right upper extremity at the shoulder pursuant to the AMA Guides, Fourth Edition. Claimant was referred back to Dr. Koprivica on February 16, 1999, for a second examination. At that time, Dr. Koprivica diagnosed cumulative injuries to both shoulder girdles, as well as the cervical spine from claimant's ongoing work activities. Dr. Koprivica again assessed claimant a 29 percent impairment to the right upper extremity at the level of the shoulder and, in addition, assessed a 15 percent impairment to the claimant's left upper extremity at the level of the shoulder. He also assessed claimant a 5 percent impairment based upon claimant's cervical complaints. These all combined to a 28 percent whole person impairment.

Dr. Koprivica went on to testify that claimant had suffered a loss of 95 percent of his task performing abilities based upon a review of the task analysis created by vocational expert Bud Langston.

He acknowledged that spondylosis is a wear-and-tear problem. It was discussed during Dr. Koprivica's deposition that, in Exhibit 4, which is a pain form completed by claimant, claimant made no reference to any pain in his neck, but did make reference to pain in his upper extremities up to and including the shoulders.

The only indication in Dr. Koprivica's record that claimant had neck complaints was the February 16, 1999, report generated by Dr. Koprivica. The neck complaints were also not contained in Dr. Koprivica's handwritten notes. The first mention with regard to the neck occurred in the fall of 1998. This was pursuant to the medical reports provided to Dr. Koprivica for review prior to his deposition.

Dr. Koprivica testified that claimant experienced difficulty in his left shoulder as a result of overuse secondary to the immobilization of the right shoulder. He found the nature of claimant's work to be an unusual stressor to both the claimant's neck and shoulders.

The Appeals Board finds that claimant has proven that he suffered accidental injuries to his right shoulder on June 1, 1996, and to his left shoulder through a series beginning April 1997 and continuing through June 13, 1998. The Administrative Law Judge awarded claimant a 10 percent functional impairment to the right upper extremity at the shoulder and a 5 percent functional impairment to the left upper extremity at the shoulder. The Appeals Board affirms those findings.

Claimant contends entitlement to a whole body disability for two reasons. First, claimant argues that claimant overcompensated with the left upper extremity after injuring the right and, therefore, the injury to the left upper extremity would be a reasonable and natural consequence of the original right upper extremity injury. However, the evidence does not support this. While that argument is contained in claimant's brief and was presented by claimant's attorney, it is not supported by claimant's testimony.

Second, claimant argues that he suffered a simultaneous aggravation to his upper extremities and that the right shoulder worsened after claimant returned to work and developed problems with the left. However, that claim is also not supported by the evidence. The only health care provider who agreed with claimant's argument of simultaneous aggravation was Dr. Koprivica. However, Dr. Koprivica initially rated claimant's right shoulder at 29 percent to the body on December 13, 1997. When Dr. Koprivica examined claimant for the second time, after claimant suffered accidental injuries to his left upper extremity, Dr. Koprivica continued to rate claimant's right upper extremity at 29 percent to the body as a whole. While claimant may have had pain complaints during this period, the evidence does not support claimant's contention that his right upper extremity worsened during the period of time his left upper extremity problems were developing.

It is acknowledged where a claimant's hands or arms are simultaneously aggravated resulting in a work-related injury to both upper extremities, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 1997 Supp. 44-510e. Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986). However, where the two injuries are totally independent, separate and distinct traumatic occurrences, they cannot be tied together to produce an award of general body disability. Rodriguez v. Henkle Drilling & Supply Co., 16 Kan. App. 2d 728, 828 P.2d 1335, *rev. denied* 251 Kan. 939 (1992).

In this instance, the Appeals Board finds claimant has failed to prove that he suffered simultaneous aggravation to his upper extremities. In addition, claimant has failed to prove that the injury to his left upper extremity at the shoulder occurred as a reasonable

and natural consequence of the original right shoulder injury. Claimant has proven an injury to the right shoulder occurring on June 1, 1996, followed by a separate injury to the left shoulder occurring as a series from April 19, 1997, through June 13, 1998.

The Appeals Board further finds claimant is entitled to unauthorized medical treatment up to the statutory maximum for each injury upon presentation of an itemized statement verifying same.

The Board further finds claimant entitled to future medical upon application to and approval by the Director for the injuries suffered to his shoulders.

Finally, claimant contends that the Administrative Law Judge ignored uncontroverted evidence in the form of the work disability opinion of Bud Langston. As noted above, claimant is not entitled to a work disability, having been awarded a scheduled injury to the right shoulder, followed by a separate scheduled injury to the left. Therefore, the Administrative Law Judge did not ignore uncontroverted evidence, but instead found the evidence from Mr. Langston to be irrelevant to this award.

### **AWARD**

#### **DOCKET NO. 219,259**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated January 16, 2001, should be, and is hereby, affirmed, and that an award of compensation is hereby made in accordance with the above findings in favor of claimant, Perry A. Patterson, and against the respondent, Zack Taylor, Inc., and its insurance carrier, Hartford Insurance Company, for an accident occurring on June 1, 1996. Claimant is awarded 30 weeks of temporary total disability compensation at the rate of \$326 per week totaling \$9,780.00, followed by 19.5 weeks permanent partial disability compensation at the rate of \$326 per week totaling \$6,357.00 for a 10 percent loss of use of the right upper extremity at the shoulder, making a total award of \$16,137.00. At the time of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

#### **DOCKET NO. 234,119**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that an award of compensation is hereby made in favor of claimant, Perry A. Patterson, and against the respondent, Zach Taylor, Inc., and its insurance carrier, Continental Western Insurance Company, for an injury occurring through June 13, 1998. Claimant is entitled to 11.25 weeks permanent partial disability compensation at the rate of \$351 per week in

the amount of \$3,948.75 for a 5 percent loss of use of the left shoulder. The entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carriers to be paid as follows:

Curtis, Schloetzer, Hedberg, Foster & Associates Bud Langston Deposition	\$241.40
Nora Lyon & Associates Regular Hearing Transcript	\$342.90
Appino & Biggs Reporting Service, Inc. Michael T. McCoy, M.D. Deposition	\$370.45
Kevin R. Sundbye, M.D. Deposition	\$410.80
Gene Dolginoff Associates Charles E. Nye, M.D. Deposition	\$237.00
P. Brent Koprivica, M.D. Deposition	\$344.68

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2001.

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BOARD MEMBER

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c: Mark W. Works, Topeka, KS  
Michael M. Jackson, Topeka, KS  
James B. Biggs, Topeka, KS  
Heather Nye, Kansas City, MO  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director